No. 5708

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IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GEORGIA CASUALTY COMPANY,
a corporation,
Appellant,

vs.

LAURETT BOYD,
Appellee.

APPELLANT'S BRIEF.

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STATEMENT OF THE CASE.

This case involves an action by the appellee, Laurett Boyd, against the appellant, Georgia Casualty Company, upon a physician's liability insurance policy, issued in May, 1925, by appellant to one Dr. George O. Jarvis, a physician practising his profession in San Francisco. The action is predicated upon a judgment secured by appellee against Dr. George O. Jarvis on October 17, 1927, based upon the alleged negligence or malpractise of Dr. Jarvis in performing an operation upon appellee in November, 1925 (printed Transcript, pp. 1-5).

Appellant contested appellee's claim against the policy issued by it to Dr. Jarvis upon the sole ground

that Dr. Jarvis had made a false statement in his application for said policy, which false statement by the applicant was a breach of warranty or a misrepresentation or concealment of a fact material to the contract, thereby avoiding the policy (Tr. pp. 6-11), and entitling the company to rescind the policy, which it did.

THE ISSUE.

The question for determination here is: whether a breach of warranty or misrepresentation of a material fact by the insured, Dr. George O. Jarvis, in his application to appellant for a physician's liability insurance policy entitled appellant insurance company to rescind such policy after appellee's claim against Dr. Jarvis for malpractise arose, but *before* any action was commenced by appellee against Dr. Jarvis, the insured, for damages for such malpractise, and of course long before any action was commenced by her upon the policy.

The trial court held that "the right of the plaintiff to sue for damages for injuries sustained had accrued during the life of the policy and before the attempted rescission; such right was therefore not affected by anything that may have occurred thereafter between the insurer and the insured" (Tr. pp. 15-16).

We respectfully contend that the statement of the insured, Dr. George O. Jarvis, in his application for

the policy was false under his own uncontradicted testimony; that such false statement constituted a breach of warranty or misrepresentation as to a material fact, entitling the appellant to rescind the policy; that the policy was rescinded within the time and in the manner prescribed by statute *before* any action was commenced by appellee against insured or insurer; and, finally, that the District Court erred in holding that the rescission of the policy by appellant upon the ground of the insured's breach of warranty or misrepresentation in his application did not affect any "right" appellee may have had against the policy.

THE EVIDENCE.

It appears from the evidence that in May, 1925, Dr. Jarvis made written application (Tr. pp. 39-41; defendant's Exhibit "B") to the defendant for a physician's liability policy, and that, pursuant to such application, the policy applied for was issued by defendant to Dr. Jarvis (Tr. pp. 23-24; plaintiff's Exhibit "1"). It also appears from the testimony and the record that notice in writing of rescission of the policy in question was given to Dr. Jarvis by the defendant on August 26, 1926 (defendant's Exhibit "A"; Tr. pp. 35-36). The premium paid by Dr. Jarvis for the policy was returned to him at the same time (Tr. p. 30).

The ground for rescission by the company was the falsity of a statement made by the insured in his application as follows:

> "No claim or suit is pending against me for damages on account of alleged error, mistake or malpractise, and no claim has been paid by me, and no judgment has been entered against me for damages on account of alleged error, or mistake, or malpractise, except as follows: *None*" (Tr. pp. 30-41; defendant's Exhibit "B").

The falsity of this statement is established by testimony of Dr. Jarvis himself that he had, prior to signing said application, paid a claim asserted against him by one Mrs. Anne Bertin on account of his alleged malpractise in treating her (Tr. pp. 44-45).

It further appears that Mrs. Boyd, the appellee in this case, made claim against Dr. Jarvis for his alleged malpractise, in November, 1925, in treating her, and that, on September 21, 1926 (after appellant had given notice of rescission of the policy to Dr. Jarvis), she commenced an action in the Superior Court of the City and County of San Francisco, State of California, against Dr. Jarvis for damages for the alleged malpractise, which she prosecuted to judgment against Dr. Jarvis, judgment having been docketed on October 19, 1927.

On December 13, 1927, appellee commenced this action against appellant, Georgia Casualty Company, upon the policy of insurance issued by it to Dr. Jarvis.

In its answer, appellant pleaded the avoidance of the policy by the falsity of the statement by Dr. Jarvis in his application (and incorporated in the policy) that "no claim has been paid by him" for an alleged malpractise (Tr. p. 9).

ARGUMENT AND AUTHORITIES.

I.

THE STATEMENT OF THE INSURED, DR. GEORGE O. JARVIS, THAT NO CLAIM HAD BEEN PAID BY HIM IS A WARRANTY. THE FALSITY OF THIS STATEMENT WAS A BREACH OF THE WARRANTY GIVING THE COMPANY THE RIGHT TO RESCIND.

The facts of this case are simple and there is no conflict in the testimony. Dr. George O. Jarvis, the insured, filled out in his own handwriting and signed an application addressed to the Georgia Casualty Company for a physician's liability policy. In that application he stated, among other things:

> "10. No claim or suit is pending against me for damages on account of alleged error or mistake or malpractise and *no claim has been paid by me* and no judgment has been entered against me for damages on account of alleged error or mistake or malpractise, except as follows: *None.*"

The application provided that the statements made in it "are warranted by the assured to be true and correct, and in consideration of which the policy is issued" (Tr. p. 39).

Pursuant to the application as submitted, the company issued to Dr. Jarvis the policy applied for, in which it was provided that:

> "Georgia Casualty Company, Macon, Georgia (herein called the Company), a stock company, in consideration of twenty-five dollars ($25.00) premium, *and the statements contained in the schedule endorsed hereon and made a part hereof,*

> which statements the assured makes and represents to be true by the acceptance of this policy, does hereby agree to indemnify Dr. George O. Jarvis, etc."

The "Schedule of Statements" endorsed on the policy states that

> "this policy is based upon the following statements which are represented by the assured to be true and correct, and in consideration of which the policy is issued:"

and statement No. 10 in the Schedule of Statements endorsed on the policy is the same as statement No. 10 in the application, with the answer "No exceptions".

The testimony is positive and without conflict that Dr. Jarvis had, prior to the time that he signed the application and prior to the issuance of the policy to him by the appellant, paid a claim asserted against him by one Mrs. Anne Bertin, who suffered an infection following an operation by the doctor and who claimed that the infection was the fault of the doctor (Tr. pp. 44-45). This evidence clearly establishes the falsity of the statement in the application and in the Schedule of Statements in the policy that the insured had paid no claim. The trial court was convinced of the falsity of the statement in the application, as appears from the following excerpt from the record:

> "The Court. It did not make any difference what he did. This woman made some claim that she had been injured. He paid the claim. The operation he performed, it seems to me, was immaterial, in view of that testimony.

Mr. CUNHA. It would tend to prove whether there was an actual claim that had been made.

The COURT. He says there was, and he paid the money. There must have been some claim made, or he would not have paid the money" (Tr. p. 48).

The evidence shows that, upon learning of the falsity of the statement and on August 26, 1926, the appellant delivered to Dr. Jarvis a notice of rescission and with it returned to him the premium which he had paid for the policy (Tr. p. 35). This was done *before* the appellee in this case had commenced her action against the doctor in the Superior Court of the City and County of San Francisco in which she secured a judgment against him. The present suit upon the policy was not filed until December 13, 1927.

The law applicable to the facts in this case is clear and positive. Whether the statement in the application be construed as a *warranty* or a *representation* or a *concealment* is immaterial; the falsity of the statement rendered the policy voidable and gave the company the right to rescind.

We contend that the statement by Dr. Jarvis that he had paid no claim asserted against him is a *warranty* under the provisions of the California Civil Code, which are as follows:

Sec. 2604. "No particular form of words is necessary to create a warranty."

Sec. 2605. "Every express warranty, made at or before the execution of a policy, must be con-

tained in the policy itself, or in another instrument signed by the insured and referred to in the policy, as making a part of it."

Sec. 2606. "A warranty may relate to the past, the present, the future, or to any or all of these."

Sec. 2607. "A statement in a policy, of a matter relating to the person or thing insured, or to the risk, as a fact, is an express warranty thereof."

Sec. 2610. "The violation of a material warranty, or other material provision of a policy, on the part of either party thereto, entitles the other to rescind."

Sec. 2612." A breach of warranty, without fraud, merely exonerates an insurer from the time that it occurs, or where it is broken in its inception prevents the policy from attaching to the risk."

The statement by the doctor that he had paid no claim was made at or before the execution of the policy and is contained in the policy itself; the statement was of a matter relating to the person insured and to the risk as being a fact. It therefore was an *express* warranty within the meaning of the above code sections. Being a warranty, the materiality or immateriality of the statement is of no importance; the falsity of the statement gave the company the right to rescind and is a complete defense to this action.

"The falsity of warranties renders the policy issued in reliance thereon void, and constitutes a defense to an action upon the policy, although the breach may not have contributed to the loss. The

fact that statements were made in good faith is immaterial. * * * One of the very objects of a warranty is to preclude all controversy about the materiality or immateriality of the statement."

14 *Cal. Juris.*, p. 494.

See also:

Wolverine Brass Works v. Pacific Coast Cas. Co., 26 Cal. App. 183; 146 Pac. 184;

McKenzie v. Scottish etc. Ins. Co., 112 Cal. 548; 44 Pac. 922.

Warranties are *affirmative* or *promissory*. *Affirmative* warranties are those which assert the existence of a fact at the time of insurance and avoid the contract if the allegation is untrue; a *promissory* warranty is one which requires something shall be done or omitted after the insurance takes effect and during its continuance, and avoids the contract if the thing to be done or omitted is not done or omitted accordingly.

14 *Cal. Juris.* 495, 505;

McKenzie v. Scottish etc. Ins. Co., supra.

"A breach of an affirmative warranty consists in the falsehood of the affirmation, when made, while that of a promissory warranty, which is executory in its nature, is the nonperformance of the stipulation."

14 *Cal. Juris.* 493;

Cowan v. Phoenix Ins. Co., 78 Cal. 181; 20 Pac. 408.

The statement by the insured (Dr. Jarvis) in the application and policy that he had paid no claim for alleged error or mistake or malpractise was, therefore, an *affirmative warranty;* and, since that statement was untrue, it constituted a breach of the warranty which avoided the policy.

> "It has been said that the purpose of warranties and conditions is to protect the insurer from liability on risks which he is unwilling to take for the stipulated premium, or perhaps for any premium."
>
> 14 *Cal. Juris.* 492.

See also:

Goorberg v. Western Assurance Co., 150 Cal. 510; 89 Pac. 130;

Finkbohner v. Glenn Falls Ins. Co., 6 Cal. App. 379; 92 Pac. 318.

The law in California upon this subject conforms to the general rule. The United States Supreme Court has said that, in case of a warranty, the right of the plaintiff to recover is defeated upon proof that an answer to any of the questions in the application is untrue, without regard to the materiality of the questions or the good faith of the answer.

Ins. Co. v. Trefz, 104 U. S. 197, 202; 26 L. Ed. 708;

Jeffries v. Life Ins. Co., 22 L. Ed. 833;

Piedmont etc. Life. Ins. Co. v. Ewing, 23 L. Ed. 610.

II.

EVEN IF THE STATEMENT BE CONSTRUED AS A REPRESENTATION, THE FALSITY OF IT GAVE COMPANY RIGHT TO RESCIND AND IS A COMPLETE DEFENSE TO THIS ACTION.

If the statement of Dr. Jarvis that he had not paid any claim against him on account of alleged error or mistake or malpractise be construed as a *representation,* and not as a warranty, nevertheless it was *material* to the acceptance of the risk, and therefore is a complete defense to this action upon the policy.

The Civil Code of the State of California contains a statement of the law upon the subject of concealment and representations as applicable to insurance contracts. The sections of importance here are as follows:

> Sec. 2561. "A neglect to communicate that which a party knows, and ought to communicate, is called a concealment."
>
> Sec. 2562. "A concealment, whether intentional or unintentional, entitles the injured party to rescind a contract of insurance."
>
> Sec. 2563. "Each party to a contract of insurance must communicate to the other, in good faith, all facts within his knowledge which are or which he believes to be material to the contract, and which the other has not the means of ascertaining, and as to which he makes no warranty."
>
> Sec. 2565. "Materiality is to be determined not by the event, but solely by the probable and reasonable influence of the facts upon the party to whom the communication is due, in forming his

estimate of the disadvantages of the proposed contract, or in making his inquiries."

Sec. 2579. "A representation is to be deemed false when the facts fail to correspond with its assertions or stipulations."

Sec. 2580. "If a representation is false in a material point, whether affirmative or promissory, the injured party is entitled to rescind the contract from the time when the representation becomes false."

In the light of the foregoing provisions of the California Civil Code, it will be seen that the falsity of the insured's statement in his application for the policy was at least a misrepresentation, entitling the appellant to rescind the contract of insurance because it was material to the acceptance of the risk by the company. The fact that the parties asked and answered the question relative to the payment of a claim against him by the insured establishes the materiality of the statement. Where the representations are in the form of written answers made to written questions, the parties have, by putting and answering the questions, indicated that they deemed the matter to be material.

"The inquiry shows that the insurer considers the fact material, and an answer by the insured affords a just inference that he assents to the insurer's view. The inquiry and answer are tantamount to an agreement that the matter inquired about is material, and its materiality is not, therefore, open to be tried by the jury."

May on Insurance, Sec. 185;

McEwen v. N. Y. Life Ins. Co., 23 Cal. App. 694, 697; 139 Pac. 242.

> "The fact that the company makes a specific inquiry of the insured as to a particular matter establishes its materiality. Although the answer to a question asked by insurer may not be material in itself, it may be rendered material by the fact that the effect of the answer is to prevent the company from pursuing his inquiry as to material matters."
>
> 32 *Corpus Juris,* 1289;
>
> *Snare etc. Co. v. St. P. F. & M. Co.,* 258 Fed. 425.

But even if the statement is not "deemed" to be material from the fact that the question was asked and answered by the parties in the case at bar, the materiality has nevertheless been affirmatively established by the testimony. The stipulated testimony of Mr. Keil, the manager of the defendant company at the time the policy in question was issued, was that, if the answer to statement No. 10 in the application by Dr. Jarvis had been that he had paid a claim asserted against him for alleged error or mistake or malpractise, the company would not have issued the policy (Trans. p. 47). It therefore follows that the policy was avoided by a false representation as to a fact material to the acceptance of the risk, which gave the company the right to rescind and constitutes a complete defense to this action upon the policy.

In the case of

> *Rankin v. Amazon Ins. Co.,* 89 Cal. 203; 26 Pac. 872,

involving an action on a fire insurance policy, the

policy referred to an application and survey containing questions and answers. The Court said:

> "The fact that the survey was not furnished until after the policy was delivered may have deprived it of any force or effect as a *warranty,* under Sec. 2605 of the Civil Code; but conceding this to be true it does not destroy its effect as a representation of facts made as an inducement for the issuance of the policy. * * * If any of the material representations were false, the defendant's tender of the premium and notice that the policy was cancelled before the commencement of the suit operated to rescind the contract (Civ. Code, Secs. 2580, 2583)."

In another case the California District Court of Appeal said:

> "Where the applicant for an insurance policy signs an application certifying to the truth of statements therein contained material to the risk and delivers it to the defendant, those statements become his solemn representations. * * *"
>
> "The further fact that the insurer exacted and the applicant gave a statement as to previous injuries to his eyes or defects of vision, proves that the parties considered and agreed that this matter was material. Having so agreed, the fact of its materiality is binding upon them."
>
> *Porter v. Gen. Acc. etc. Assur. Corp.,* 30 Cal. App. 198, 204, 205; 157 Pac. 825.

A material misrepresentation, whether affirmative or promissory, entitles the injured party to rescind the contract from the time when the representation becomes false.

14 *Cal. Juris.* 490.

"A fraudulent misrepresentation will avoid the contract whether it is expressly so stipulated or not. Representations are *dehors* the contract."

Wheaton v. North British etc. Ins. Co., 76 Cal. 415, 424; 18 Pac. 758.

For lack of substantial truth, the fact that the answer was made in good faith is no valid excuse.

Ins. Co. v. Trefz, 104 U. S. 197; 26 L. Ed. 708.

Whether a question is immaterial depends upon the question itself. But if, under any circumstances, it can produce a reply which will influence the action of the company, the question cannot be deemed immaterial.

Jeffries v. Life Ins. Co., 22 L. Ed. 833.

It is the duty of the assured to place the underwriter in the same situation as himself; to give to him the same means and opportunity of judging of the value of the risk; and when any circumstance is withheld, however slight and immaterial it may have seemed to himself, that, if disclosed, would probably have influenced the terms of the insurance, the concealment vitiates the policy.

Sun Mut. Ins. Co. v. Ocean Ins. Co., 107 U. S. 485, 510; 27 L. Ed. 337;

Clark v. Manufacturers' Ins. Co., 8 How. 235, 248; 12 L. Ed. 1061.

III.

THE POLICY WAS RESCINDED IN THE MANNER AND WITHIN THE TIME REQUIRED BY LAW.

Under the California Civil Code, if a representation is false in a material point, whether affirmative or promissory, the insurer is entitled to rescind the policy from the time when the representation becomes false.

> Sec. 2580 *Civil Code of California;*
> *Rankin v. Amazon Ins. Co.*, 89 Cal. 203; 26 Pac. 872.

The time of rescission is fixed by Sec. 2583 of the Civil Code of California, which provides as follows:

> "Whenever a right to rescind a contract of insurance is given to the insurer by any provision of this chapter, such right may be exercised at any time previous to the commencement of an action on the contract."

The notice of rescission of the policy was given to Dr. Jarvis on August 26, 1926 (defendant's Exhibit "A"; Tr. pp. 35-36), and the premium paid by him for the policy was returned to him at the same time (Tr. p. 30). The appellee's suit against Dr. Jarvis was not commenced until September 21, 1926, and the present suit upon the policy was not filed until December 13, 1927. Notice of rescission was, therefore, given within the time required by law and before the commencement of *any* action, either against the assured or against the company upon the policy. And at the time of notice of rescission the company re-

turned to the assured the premium in full received from him in payment for the policy. This action on its part constituted a complete and legal rescission of the contract, and no policy was, therefore, in existence at the time of the commencement of the action upon the policy and not even at the time of the commencement of appellee's prior action against Dr. Jarvis.

IV.

THE CASES CITED BY APPELLEE IN THE LOWER COURT ARE NOT IN POINT.

Appellant will have no opportunity to make written reply to appellee's brief, so will take occasion at this time to show that the cases cited by appellee in the trial Court are not in point in the case at bar.

In the trial Court appellee argued that the rescission of the policy by the company was "ineffective as to this plaintiff (appellee)", and cited as authority for that contention:

Malmgren v. Southwestern etc. Ins. Co., 201 Cal. 29;

Pigg v. International Indemnity Co., 86 Cal. App. 671;

Finkelburg v. Continental Casualty Co., 126 Wash. 543; 219 Pac. 12;

Stusser v. Mutual Union Ins. Co., 127 Wash. 449; 221 Pac. 331.

The *Malmgren* case, supra, is not in point and is of no assistance to the Court in the case at bar. It merely holds that the California statute (Stats. 1919, p. 776; see Tr. pp. 12-13) is a part of every indemnity policy issued in the State of California, giving a person injured by the insured a right of action upon the policy after judgment against the insured, if he is insolvent. More particularly, it holds that a return of execution unsatisfied is unnecessary to an action upon the policy, but that insolvency of the judgment debtor may be established in some other way. These matters are not involved in the case at bar. We concede the insolvency of the insured, Dr. Jarvis; we concede that appellee could maintain this action upon the policy issued by appellant to Dr. Jarvis, if the policy had not been rescinded by appellant prior to the commencement of such action because of the false statement in Dr. Jarvis' application for the policy. In the *Malmgren* case there had been no breach of warranty or misrepresentation of a material fact in the application for the policy, and the policy had never been rescinded but was a valid, existing policy at the time the plaintiff commenced the action upon it. Consequently, that case is clearly not in point here.

Pigg v. International Indemnity Co., supra, likewise is not authority upon the issue in the case at bar. It involved much the same issue as the *Malmgren* case, the California District Court of Appeal holding that the insolvency endorsement required by the California statute (Stats. 1919, p. 776) was a part of the in-

demnity policy "even though not incorporated therein." There was an attempt in the *Pigg* case on the part of the indemnity company to defend against the action upon the policy upon the ground that the insured did not cooperate with the company in the defense of the case, as required by the policy, but the Court held that the *evidence* did not support this defense.

The *Finkelburg* and *Stusser* cases, supra, are decisions of the Supreme Court of the State of Washington, and neither of them supports the decision of the trial Court in the case at bar. Both of these cases pass upon the right of a third party to sue upon a policy and to what extent the company can defend for the failure of the assured to give notice of accident or give notice of an action against the assured. None of these things is involved in the case at bar. Our defense is not that Dr. Jarvis failed to do something required by the policy *after* the alleged act or omission in connection with the treatment of Mrs. Boyd; our defense is that, because of the false statement in Dr. Jarvis' application, the company was induced to issue a policy of insurance which it would not have issued had his answer been in accordance with the facts. This was a breach of an affirmative warranty (or at least a material misrepresentation) which affected the validity of the policy and gave the company the right to rescind, as it did. It is quite different from the failure of an assured to do something required by a *valid,* existing policy, such as failure to give notice of

accident, failure to give notice of suit, failure to cooperate with the company in the defense of the action, etc.

In the trial Court, counsel for appellee also contended that "plaintiff's right to judgment against defendant is *absolute.*" This is indeed an extravagant statement. It means that there is no defense whatsoever to an action by a third party upon a policy of liability insurance. Such a contention is manifestly absurd.

Counsel apparently based this contention upon the "insolvency endorsement" appearing upon the policy, pursuant to the California statute (Tr. pp. 12-13). But this statute does nothing more than give a person who has secured a judgment against the insured *the right to sue* the insurance carrier upon the policy in the event of the insolvency or bankruptcy of the insured. It does not take away from the insurance carrier the right to defend against such a suit where the policy has been secured by a misrepresentation of the assured in applying for the policy, or where he has committed a breach of an affirmative warranty, as in the case at bar. If the statute could be said to go so far as that, it would impliedly repeal all of the provisions of the Civil Code upon the subject of warranties and representations applicable to insurance contracts. Aside from the fact that repeals by implication are frowned upon, there is no such implication in this statute.

The statute (Stats. 1919, p. 776) specifically provides that an action on the policy is "subject to its terms and limitations." And in the *Malmgren* case, supra, the Court recognized that this limitation "has reference to those matters concerning which the insurer and assured could legally contract."

The defense in the case at bar is concerned with the validity of the policy itself. The company was in effect defrauded into issuing the policy by the false statement in the application for the policy. Having subsequently discovered the falsity of this statement, the company, within the time and manner provided by law (Secs. 2580 and 2583, *Civil Code of California),* rescinded the policy. The contention of counsel for appellee that plaintiff's right to judgment against defendant is "absolute" and that the company cannot assert this defense, is without support of any decision or authority whatsoever.

The case of

Kruger v. Cal. Highway Ind. Exchange, 74 Cal. Dec. 172,

cited by appellee, is not authority for that proposition and is not in point. In that case the Court was construing a "jitney bus" *bond,* executed pursuant to the provisions of the "jitney bus" ordinance of the City of Los Angeles. The bond in that case, as required by the statute, *specifically guaranteed* the payment of any judgment against the "jitney bus" driver on whose behalf the bond was executed. No question of the validity of the bond was raised, but the defendant

surety company attempted to avoid liability upon the ground that the principal ("jitney bus" driver) failed to report the action against him to the surety company. A default judgment was taken against the principal, which became final, and thereafter suit was filed upon the bond. The appellate Court merely held that, having *guaranteed* the payment of *any* judgment against the principal, the indemnity company was bound by the judgment, even though its principal had failed to notify it of the action. The ordinance in that case, which required a bond from the "jitney bus" *guaranteeing* the payment of any judgment against it, is quite different from the California insolvency statute (Stats. 1919, p. 776), which merely *permits a suit* upon a liability policy issued to a private citizen after judgment against the assured and in the event of his insolvency. Furthermore, the defense that the "jitney bus" driver failed to notify the surety company of the accident is quite different from the defense asserted by the appellant in the case at bar, that the policy was avoided by insured's breach of warranty or misrepresentation and rescinded.

The best indication that the California appellate courts did not in the *Malmgren, Pigg* and *Kruger* cases, supra, intend to, and in fact did not, deprive a liability insurance carrier of the defense asserted by appellant in the case at bar is found in the later case of

Bryson v. International Indemnity Co., 55 Cal. App. Dec. 87 (advance sheets),

which specifically holds that, although the statutory insolvency endorsement in the policy permits an action upon the policy by a third party who has secured a judgment against an insolvent insured, such action is nevertheless subject to the *terms* and *limitations* of the policy. The headnote to the cited case reads as follows:

> "In an action brought against the insurance carrier upon a policy of automobile liability insurance by the holder of a judgment against the insolvent insured, the judgment of the plaintiff is conclusive *only in respect to matters adjudged, and the carrier is not estopped by reason of the judgment in favor of the plaintiff against the insured, to defend that he is not liable under the terms of the policy as an indemnitor.*" (Italics ours.)

The insurance carrier denied liability in that case upon the ground that the claimant at the time of the accident was "being transported by the insured for an implied consideration," contrary to the terms of the policy. The issue raised by this defense did not receive the consideration of the trial Court, which proceeded upon the erroneous theory that defendant was estopped to raise this question. The appellate Court reversed the judgment and directed that the trial Court retry the issue raised by this defense. The appellate Court said:

> "Since the policy provides for an action on such a judgment by the injured person against the company, under the circumstances stated, *the evident intent is that such person shall have the rights which the insolvent insured would have*

had if he had paid the judgment. Such a judgment is conclusive only in respect to the matters adjudged. No one would contend that it precludes the company from defending on the ground that it did not issue the alleged policy or that the policy issued by it does not cover the motor vehicle which caused the injury. It seems equally clear that the company may show in defense that its policy does not indemnify against liability for damage to persons of the class to which the injured person belongs. (1) In other words, before the company can be held liable as an indemnitor it must be proved that it is an indemnitor. 'While one who is required to protect another from liability is bound by the result of litigation to which such other is a party, provided the former had notice of such litigation, and an opportunity to control its proceedings, *a judgment against a party indemnified is conclusive in a suit against his indemnitor only as to the facts thereby established. The estoppel created by the first judgment cannot be extended beyond the issues necessarily determined by it.*' (14 R. C. L. 62; 31 C. J. 461; Pezel v. Yerex, 56 Cal. App. 304, 309.)" (Italics ours.)

Bryson v. Int. Ind. Co., supra.

CONCLUSION.

The material facts in this case are without conflict. Appellant company issued a physician's indemnity policy to Dr. Jarvis upon his written application for the same. Thereafter, and on August 26, 1926, the company rescinded said policy upon the ground of Dr. Jarvis' breach of warranty, or misrepresentation of a material fact in his application, giving Dr. Jarvis

written notice thereof and returning therewith the premium paid by him for the policy. On September 21, 1926, appellee commenced an action against Dr. Jarvis for his alleged malpractise in performing an operation upon her in November, 1925, and in October, 1927, a judgment was secured in said action in favor of appellee and against Dr. Jarvis. In December, 1927, appellee commenced this action against appellant upon the policy, which had been rescinded some sixteen months before.

There is only one issue in the case, and that is, whether or not appellee is entitled to recover upon the policy, which had been rescinded by appellant in the manner and well within the time provided by law (some sixteen months before action was commenced by appellee upon the policy), for the alleged error, mistake or malpractise of Dr. Jarvis in performing the operation upon appellee before the rescission of the policy.

The holding of the trial Court that the rescission of the policy did not defeat appellee's right to recover upon the policy is erroneous and finds no support in any statute or decision. We respectfully submit that the judgment of the lower court should be reversed and judgment ordered for appellant.

Respectfully submitted,

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333 Pine Street, San Francisco.
Attorneys for Appellant.

Dated: San Francisco, Calif.,
May 18, 1929.